

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

PORTIA MILLER and)	
JANICE GREEN,)	
)	
Plaintiffs,)	
)	C.A. No. 02C-12-100 MJB
v.)	
)	
GLENDa McLEAN,)	
JOHN CHEERS,)	
CUSTOM COMPUTER SERVICE,)	
INC., SHARNELL BRICE,)	
JOYCE DANIELS and)	
CHARLES WARREN)	
)	
Defendants.)	

Submitted: June 7, 2006
Decided: August 17, 2006

Upon Cross Motions for Costs.
GRANTED IN PART, DENIED IN PART.

ORDER

Kenneth M. Roseman, Esquire, Cicone, Roseman & Wasserman,
Wilmington, Delaware, Attorney for Plaintiffs.

Nancy Chrissinger Cobb, Esquire, Chrissinger & Baumberger, Wilmington,
Delaware, Attorney for Defendant Glenda McLean.

George T. Lees, III, Esquire, Bifferato, Gentilotti, Biden & Balick,
Wilmington, Delaware, Attorney for Defendants John Cheers and Custom
Computer Service, Inc.

BRADY, J.

Facts and Procedural History

This case arises out of an action instituted by Portia Miller (“Ms. Miller”) for personal injuries she sustained in three separate motor vehicle collisions in 2001. The case also included a claim by Janice Green (“Ms. Green”) for injuries she claimed to have sustained in Ms. Miller’s second collision in July 2001.

On December 7, 2004, an arbitration award was entered in favor of Ms. Miller in the amount of \$29,000, attributing \$18,000 in damages to Glenda McLean (“Ms. McLean”), \$7,000 to John Cheers (“Mr. Cheers”) and Custom Computer Service, Inc. (“Custom Computer”) and \$4,000 to Charles Warren (“Mr. Warren”).

On December 23, 2004, Ms. McLean filed an appeal of the arbitration award. Prior to trial, the defendant filed a joint offer of judgment in the amount of \$30,000. After a trial, the jury returned a verdict for Ms. Miller in the amount of \$55,000. Ms. Miller, Ms. McLean, Custom Computer and Mr. Cheers have filed Motions for Costs to be assessed against the opposing parties.

Contentions of the Parties and Applicable Law

Ms. McLean's Motion for Costs

Ms. McLean has filed the instant Motion for Costs requesting the following:

Dr. Jeffrey Meyers:	\$2,500.00
Dr. Francis Tannian:	\$1,500.00
Court Costs:	\$385.00
Interest on Arbitration Award:	\$2,125.00
Total:	\$6,510.00

Mr. Cheers and Custom Computer concede that they are obligated to pay interest on the \$7,000 arbitration award attributable to them, which amounts to \$595.00 (\$35.000 per month times 17 months). There is also no opposition to the \$385.00 in court costs requested by Ms. Miller. However, Mr. Cheers and Custom Computer argue the fees for Dr. Tannian and Dr. Meyers are excessive and should be reduced by the Court to reflect a rate customarily permitted by this Court.

Ms. McLean makes similar arguments regarding the reasonableness of the expert witness fees, but also adds that there has been no testimony or assertion that either doctor's appearance precluded them from other employment and there has been no evidence of the doctors' hourly rate. Ms.

McLean also concedes she is obligated to pay interest on the arbitration award attributable to her, but does not compute the interest correctly. The correct figure, representing interest on the award of \$18,000 over 17 months at 6%, equals \$1,530.00. This is the amount Ms. McLean must pay to Ms. Miller for interest.

In Delaware, an expert's fee is recoverable as a cost of litigation only for the time the expert spends in actual attendance in court for the purpose of testifying.¹ "Attendance includes a reasonable time for traveling to and from the courthouse, waiting to testify, and testifying."²

Ms. Miller does not specify precisely what activities are reflected in the amounts for which she is seeking payment for her expert fees. The expert fees are simply listed in one lump sum. Without knowing exactly what activity the fee request includes, the Court is left to determine the reasonableness of the expert fees based on the record.

Dr. Tannian testified for approximately 30 minutes. The Court has not been advised how much time he spent out of court for compensable activity, such as travel or waiting to testify. If the Court were to award the full \$1,500 Ms. Miller requests, based on the information available, it would

¹ *State v. 0.0673 Acres of Land, etc.*, 224 A.2d 598, 602 (Del. 1966); *see also Stevenson v. Henning*, 268 A.2d 872, 874 (Del. 1970).

² *Deardorf Associates, Inc., et al, v. Paul*, 2000 WL 1211077 (Del.Super.) *citing Sliwinski v. Duncan*, 608 A.2d 730 (Del. 1992).

amount to an award at the rate of \$3,000 per hour. The Court finds this amount excessive.

This Court has previously awarded expert witness fees as costs based on a study performed in 1995 by the Medical Society of Delaware's Medico-Legal Affairs Committee.³ Based on previous awards of this court in accordance with those recommendations, the Court will award \$500 for Dr. Tannian's testimony.⁴

Neither Plaintiff nor Defendants represent how long Dr. Meyers testified. Without knowing what portion of the \$2,500 request is for recoverable expenses, the Court is left to determine whether the amount is reasonable based solely on the length of the trial testimony. A review of the record and transcript reflects that Dr. Meyers testified for approximately 2 hours. The Court finds the \$2,500 fee excessive and reduces it to \$1,500.

Ms. McLean and Mr. Cheers and Custom Computer Motions for Costs

Ms. McLean has also filed a Motion for Costs associated with Ms. Miller's alleged failure to appear at two scheduled evaluations by Ms.

McLean's insurance carrier for purposes of evaluating Ms. Miller's

³ *Kerr v. Onusko*, 2004 WL 2744607 (Del.Super.); *Cunningham v. Outten*, 2001 WL 879999 (Del.Super.).

⁴ See e.g. *Burton v. Christiana Care Health Services, Inc.*, 2004 WL 2154124 (Del.Super.) (awarding medical expert costs for trial testimony at \$500 per hour); *Tolson v. Chorman*, 2005 WL 1953039, *2 (Del.Super.) (awarding \$700 in costs for a one hour and ten minute trial deposition of a medical expert); *Banks v. J&N Hickman Family Limited*, 2006 WL 240641 at *2 (Del.Super.) (awarding \$850 in costs for a 45 minute expert trial deposition).

condition.⁵ Ms. McLean also alleges Ms. Miller failed to appear for a second examination. Ms. McLean seeks “no-show” fees incurred due to Ms. Miller’s alleged failure to appear in the amount of \$765.00 and \$770.00 respectively. Ms. McLean states she put Ms. Miller on notice she would seek these fees. Ms. McLean also seeks counsel fees incurred for her attorney’s preparation for, and traveling to, a deposition scheduled for Dr. Hershey that did not go forward, allegedly without notice to counsel. Ms. McLean seeks reimbursement for one hour preparing for the deposition and one hour traveling for the deposition at \$100 per hour, for a total of \$200.

Mr. Cheers and Custom Computer also seek to recover an \$800.00 “no show” fee from Ms. Miller for her alleged failure to appear at an Independent Medical Examination (“IME”) on January 11, 2006. Mr. Cheers and Custom Computer seek counsel fees for the deposition of Dr. Hershey that did not go forward, for which they claim their counsel expended 45 minutes preparing and 30 minutes in travel time, for a total of 1 hour and 15 minutes, and for a deposition of Dr. Meyers that did not go forward, for which they claim their counsel expended 30 minutes in preparation. In total, Mr. Cheers and Custom Computer seek 1 hour and 45 minutes in counsel fees at a rate of \$110.00, for a total of \$192.50.

⁵ *Defendant Glenda McLean’s Motion for Costs* at 2.

Ms. Miller responds to the Defendants' motions for costs by stating Superior Court Civil Rule 54(d) allows an award of costs only to the prevailing party. In addition, Ms. Miller argues, Rule 54(i) expressly disallows the award of attorney's fees requested by the Defendants and the Defendants have failed to cite to any case law that supports the award of fees for cancellation charges under Rule 54. Finally, Ms. Miller argues that even if the Court awarded costs for the cancellation fees, they should be reduced because the claimed amounts are excessive. Ms. Miller also attaches a letter to the response that indicates notice was sent to counsel for Defendants that the deposition of Dr. Hershey was cancelled.

Superior Court Civil Rule 54(d) states:

Costs. Except when express provision therefore is made either in a statute or in these Rules of the Supreme Court, costs shall be allowed as of course to the prevailing party upon application to the Court within ten (10) days of the entry of final judgment unless the Court otherwise directs.

Therefore, it appears Defendant may not recover under Rule 54, since they are not the prevailing party. However, Rule 37(d) bears directly on these claims, and states that, if a party fails to appear before the officer who is to take the deposition, after being served with proper notice, the Court shall require the party failing to act or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure,

unless the Court declines to do so because the failure was substantially justified.

Both defense counsel for Ms. McLean and Mr. Cheers and Custom Computer represent they were not notified that the depositions for Dr. Hershey and Dr. Meyers were cancelled. The Court takes these representations as true and notes that Ms. Miller does not dispute the claim that notice of cancellation was never sent for Dr. Meyers' deposition. Whether the letter canceling the deposition of Dr. Hershey was sent, lost in the transit, or just misplaced, the Court accepts the representations of two separate counsel for Ms. McLean and Mr. Cheers and Custom Computer that notice of the cancellation was never received. The Court finds the attorneys' fees for the depositions of Dr. Hershey and Dr. Meyers are reasonable and should be awarded to Defendants in the amounts claimed.

The Court declines to award the amounts claimed for the cancelled medical examinations by both Ms. McLean and Mr. Cheers and Custom Computer. There is no evidence in the record to suggest, nor do Defendants claim, that an agreement was reached with Ms. Miller regarding a mutually convenient time to schedule the IME. Therefore, the Court will not force

Ms. Miller to pay fees for not attending appointments Defendants unilaterally scheduled and which she did not agree to attend.⁶

Conclusion

For the reasons set forth herein, the Court awards costs as follows:

Ms. Miller is ordered to pay:

Counsel fees to Mr. Cheers and Custom Computer: \$192.50

Counsel fees to Ms. McLean in the amount of: \$200.00

The Defendants are ordered to pay Plaintiff:

Court Costs in the amount of: \$385.00

Expert Witness Fees for Dr. Tannian in the amount of: \$500.00

Expert Witness Fees for Dr. Meyers in the amount of: \$1,500.00

IT IS SO ORDERED.

/s/
M. Jane Brady
Superior Court Judge

⁶ See e.g. *Geroski v. Betton*, 2003 WL 21001033 (Del.Super.) (declining to order a plaintiff to pay a cancellation fee for an IME in which the defendant unilaterally set up without consulting the plaintiff).